Provisional

**For participants only**

31 May 2017

Original: English

**International Law Commission**
**Sixty-ninth session (first part)**

**Provisional summary record of the 3352nd meeting**
Held at the Palais des Nations, Geneva, on Friday, 5 May 2017, at 10 a.m.

## Contents

Crimes against humanity (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@unog.ch).

GE.17-07337 (E) 150517 310517

*1707337*

Please recycle

***Present***:

*Chairman*: Mr. Nolte

*Members*: Mr. Al-Marri
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Kolodkin
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Sir Michael Wood

***Secretariat***:

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10 a.m.*

**Crimes against humanity** (agenda item 6) (*continued*) (A/CN.4/704)

**The Chairman** invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/704).

**Mr. Ruda Santolaria**, after thanking the Special Rapporteur for his excellent third report, said that, like Mr. Park and Ms. Escobar Hernández, he was of the view that draft articles 11 and 13, which included references to draft article 5, should also refer to draft article 3, which reproduced almost word for word the definition of crimes against humanity set out in article 7 of the Rome Statute of the International Criminal Court. In addition, like Mr. Park, he considered that draft article 13 on mutual legal assistance should be moved to a separate protocol.

With regard to draft article 14, it seemed appropriate to take account of the situation of victims, witnesses and others and to emphasize the need to protect complainants, witnesses and their relatives and representatives, as well as other persons participating in proceedings within the scope of the draft articles. While he was in favour of including draft article 16 on federal State obligations, he would prefer that it did not include the words "without any limitations or exceptions", which might convey a misleading impression as to the territorial scope of the obligations undertaken by such a State.

He did not support the Special Rapporteur's proposal for draft article 17. In his view, given the nature of the subject matter of a future convention and the manner in which the specific issue of dispute settlement had been dealt with in other treaties on international crimes, including those on genocide and on apartheid, consideration should be given to wording that combined elements of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and of article XII of the International Convention on the Suppression and Punishment of the Crime of Apartheid. In the same vein, any disputes arising out of the interpretation or application of the draft articles could initially be the subject of negotiations between the States concerned; however, if no solution could be found within six months or another reasonable time frame agreed by the parties, either of those States could bring the dispute before the International Court of Justice.

He fully agreed with the comments made by Ms. Escobar Hernández and Mr. Murase concerning the issue of immunity. Although it was indeed necessary to avoid overlap with the topic of immunity of State officials from foreign criminal jurisdiction and not to prejudge the outcome of the Commission's work in that regard, the failure to take into account the provisions of treaties intrinsically linked to the future convention might be seen as a step backwards. It would therefore be appropriate to include in the draft articles a provision equivalent to article IV of the Genocide Convention, in line with Mr. Murase's suggestion.

Regarding the question of amnesty, he was of the view that a provision on the impermissibility of general amnesties should be included in the draft articles. In that regard, he would draw a distinction between, on the one hand, situations of transitional justice, in which amnesty could be considered for certain offences as a part of the post-conflict reconciliation process and, on the other, amnesty for horrendous crimes, such as crimes against humanity, which should never go unpunished. When addressing the issue of amnesty, the Special Rapporteur had rightly described the *Barrios Altos v. Peru* case, heard by the Inter-American Court of Human Rights, as "a seminal case". In that regard, it should be noted that, in paragraph 44 of its judgment of 14 March 2001 on the merits, the Court had emphasized the manifest incompatibility of self-amnesty laws with the American Convention on Human Rights and concluded that such laws lacked legal effect and could not obstruct the investigation of the grounds on which that case was based or the identification and punishment of those responsible. In his view, the failure to include in the draft articles an explicit reference to the impermissibility of general amnesties would undermine the two central aims of the future convention, namely to prevent and punish crimes against humanity. One could not but wonder whether, in the event of such amnesties being permitted, other persons in the countries concerned or in other countries might

assume that those responsible for terrible atrocities were not always punished and thus seek, ultimately, to exonerate themselves by means of tailor-made laws or agreements.

Lastly, a future convention on crimes against humanity should contain a prohibition on reservations in line with article 120 of the Rome Statute. Although such a provision might discourage some States from becoming parties to such a convention, as the Special Rapporteur had noted, it would have the beneficial effect of not lowering the standards of the Rome Statute.

**Sir Michael Wood** said that he would like to thank the Special Rapporteur for his excellent third report, which, like his previous reports, was clear and thorough and contained ample references to precedents in support of the drafts proposed. The report was long, but that was inevitable once the Commission had urged the Special Rapporteur to provide it with the materials needed for it to be in a position to complete a first reading at the current session. He hoped that the Commission would achieve that goal, which would represent an important outcome for the first year of the current quinquennium. Like Mr. Hassouna, he, too, wished to congratulate the Special Rapporteur on his extensive outreach efforts.

At the current session, Mr. Murase had once again questioned whether the topic was within the Commission's mandate and, as Mr. Kolodkin had noted, Mr. Murase had said some rather odd things about customary international law. Mr. Tladi had once again explained his views on the scope of the topic. He had already explained at the previous session why he considered those views to be wrong. He agreed with Ms. Lehto on the propriety of the general approach to the topic and would not repeat what he had said on the matter on earlier occasions.

As he was taking the floor rather late in the debate, and much had already been said, he could be rather brief. He agreed with virtually everything that Mr. Kolodkin had said. The Commission had to strike a balance between a set of draft articles that covered every conceivable issue in all its aspects and a concise and straightforward text that States would find comprehensible, useful and effective and would, hopefully, find easy to accept and ratify. He continued to believe quite strongly that, in order to maximize the participation of States in an eventual convention, it was important to maintain the focus of the draft on the core criminal law provisions, namely provisions on criminalization and the establishment of jurisdiction in domestic law; prevention; and the investigation and prosecution, or extradition or surrender, of alleged offenders.

Every additional clause beyond those core provisions risked diverting attention from them and making it harder for some States to become parties to the future convention. He would not have proposed the inclusion of a draft article on federal State obligations or a draft article on the relationship to competent international criminal tribunals. Nor should the Commission, under the topic, enter into such matters as immunity, amnesty or what to do with competing extradition requests. To do so might make the draft unacceptable to a good number of States, which would render the Commission's efforts ineffective. In his view, the Commission should be careful not overload the draft with matters that were not strictly necessary, and the inclusion of which would make it harder for States to find consensus.

Regarding amnesty in particular, he shared the concern expressed by Mr. Kolodkin at the previous meeting. He doubted that the Commission would be able to foresee all the complex situations that might arise in a context of crimes against humanity in the future, and where States might find amnesty necessary to ensure a proper transition. He was not sure that the Commission needed to request the secretariat to carry out a study on that complex and largely political matter.

The Special Rapporteur had proposed very lengthy provisions on extradition and on mutual legal assistance that were based closely on texts prepared by criminal law experts in the context of specific — largely economic — crimes. While he had an open mind concerning those proposals, his preference would have been to adopt the shorter version of those articles and to maintain the focus of the text on the core *aut dedere aut judicare* provision.

He agreed with Mr. Reinisch's comments on draft article 17 on inter-State dispute settlement. Like other speakers, he did not see the need to make an attempt to arbitrate a precondition for submission to the International Court of Justice. Such a precondition appeared in some older conventions, but it was hardly appropriate in the case of a new convention on crimes against humanity. Mr. Kolodkin's suggestion to borrow language from article 9 of the Genocide Convention was interesting and could be considered by the Drafting Committee.

He had detailed comments on many of the texts proposed by the Special Rapporteur at the current session and had noted the many helpful suggestions made by others in the debate, such as Ms. Lehto's proposal concerning the last two paragraphs of the draft preamble, as well as those made by Amnesty International in their thoughtful commentary, which would no doubt be of use to the Commission in its work. Those were matters that could be discussed in the Drafting Committee.

He could agree to the referral of all the draft provisions proposed in the report to the Drafting Committee, although, like others, he saw no need for draft articles 15 and 16 and would invite the Special Rapporteur to consider whether those two provisions should in fact be sent to the Drafting Committee.

**Ms. Galvão Teles** said that she appreciated the Special Rapporteur's excellent third report, his thorough oral presentation and, more generally, his extensive outreach efforts, which, together with the debates in the Sixth Committee, had confirmed the extreme importance of the topic of crimes against humanity. A convention on crimes against humanity would become a fundamental part of the edifice that the international community was building to promote accountability for the most serious international crimes and the fight against impunity.

While proposed draft article 11 provided for a detailed extradition regime that was inspired in large part by various existing instruments, there was nevertheless some room for improvement. For example, the draft article did not include criteria applicable in the event of multiple requests for extradition; such criteria might represent a useful addition, as Messrs. Hassouna, Jalloh and Tladi had noted. The State in whose territory the crimes had been committed was perhaps better positioned to conduct an investigation, as pointed out by Mr. Murase and others, but there might also be other useful criteria. In its proposed international convention on the prevention of crimes against humanity, the Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute had suggested criteria — in a non-hierarchical order — that might be taken into consideration in determining priority in cases of multiple requests for extradition. Those criteria were: the territory where the crimes had been committed; the nationality of the offender; the nationality of the victim; and the forum most likely to have the greater ability and effectiveness in carrying out the prosecution, and which provided greater fairness and impartiality.

Regarding draft article 11 (6), given the nature of the crime and its punishment, it would, as some members had noted, be more appropriate not to refer to the minimum penalty requirement under national law but rather to focus on the grounds on which States could refuse extradition in many legal systems, for example the risk of the death penalty being applied in the requesting State. The practice of many States in that regard should at least be mentioned in the commentary.

As for the extradition by a State of its own nationals, which was addressed in draft article 11 (9) and (10), it would seem appropriate, as Ms. Escobar Hernández had noted, to add a specific provision to the effect that, even if a State could not or did not extradite its own nationals, it had a duty to prosecute in accordance with the *aut dedere aut judicare* obligation contained in draft article 9.

Draft article 12 on *non-refoulement* was a very important provision. However, it would be better placed earlier in the text, perhaps after draft article 4 on the obligation of prevention, to which it was closely linked, as recognized by the Special Rapporteur in paragraph 97 of the report. Although the expression "in danger of being subjected to a crime against humanity" closely tracked language used in international conventions and by international courts, it might be helpful for States in determining what constituted such a danger if the explanations and practice contained in paragraphs 100 to 105 of the report on

how that danger should be assessed were to be included in the commentaries to the draft articles.

With regard to draft article 13, a less detailed "short-form" article might allow for greater flexibility, as Mr. Hassouna and Mr. Kolodkin had noted, and would be better suited to crimes against humanity than the current "long-form" article, which was modelled on the United Nations Convention against Corruption. As they currently stood, the draft articles on crimes against humanity risked turning into draft articles on mutual legal assistance in the context of crimes against humanity. Moreover, the "mini mutual legal assistance treaty" on crimes against humanity seemed to give rise to a procedural imbalance with the regimes of genocide and war crimes, which, furthermore, might complicate the prosecution at the national level of the same case for different crimes. As she could see the merit in giving States detailed and specific guidance on their legal obligations she proposed, as a compromise solution, retaining the core mutual legal assistance obligations — such as the obligation of general cooperation — in the draft articles and to include the "long-form" provisions, which were more technical and procedural in nature, in a separate protocol or annex, as had been suggested by Ms. Escobar Hernández, Ms. Lehto and Mr. Park.

The inclusion of draft article 14 on victims, witnesses and others was justified by the development of international criminal law in recent decades. However, the definition of victim presented a challenge. If the Commission were to accept the Special Rapporteur's proposal in paragraph 168 of the report to give States latitude in determining exactly which persons qualified as "victims" of a crime against humanity, the commentary should nonetheless give some indication as to who qualified as victims; in that regard, the examples and recommendations contained in the commentary prepared by Amnesty International on the Special Rapporteur's third report might prove useful. Also of use was the recommendation by Amnesty International that draft article 14 should be amended to clarify the obligations of States to protect persons who became at risk on account of investigations and prosecutions for crimes against humanity and to ensure that appropriate measures were taken to protect their physical safety, psychological well-being, dignity and privacy. Lastly, it should be made clear that the list of forms of reparation in paragraph 3 of the draft article was not exhaustive.

Draft article 15, unlike article 103 of the Charter of the United Nations and article 16 (3) of the Marrakesh Agreement establishing the World Trade Organization, cited by the Special Rapporteur in paragraph 200 of the report, gave prevalence to external instruments — existing or future — in the event of a conflict between the rights or obligations of a State under the draft articles and its rights and obligations under a constitutive instrument of a competent international tribunal. Many members had expressed support for that provision, but others had expressed doubts or suggested its deletion. In her view, if the Commission wished to retain the draft article it would be necessary amend it by specifying that certain conditions should be met, perhaps along the lines suggested by Ms. Escobar Hernández or Mr. Hassouna or by the inclusion of a reference to the application of general principles, as had been suggested by Mr. Hmoud.

Draft article 16 on federal State obligations did not seem necessary in the light of article 29 of the Vienna Convention on the Law of Treaties. However, she was prepared to accept it in view of the fact that, as mentioned in chapter VI of the report, there were precedents in other conventions and it might meet a practical need to ensure that the obligations arising from a future convention were binding on a State in respect of its entire territory.

With regard to draft article 17, she shared the views of those members, such as Ms. Escobar Hernández, Ms. Lehto and Mr. Tladi, who had advocated the inclusion of a clause providing for the referral of disputes to the International Court of Justice, such as that included in the Genocide Convention. She noted the relevance of Mr. Reinisch's suggestion that a time limit for negotiations should be established, as was the case in other conventions that contained dispute settlement clauses similar to the clause proposed by the Special Rapporteur. That said, it remained to be decided whether the Commission should propose a clause on a dispute settlement mechanism, since such clauses were usually contained in final clauses, which, as the Special Rapporteur rightly mentioned, were usually left for States to negotiate.

Echoing comments made by other Commission members, she noted that, in his proposed draft preamble, the Special Rapporteur had perhaps relied too heavily on the preamble to the Rome Statute. In her view, the Drafting Committee should carefully review the proposed text in order to make it more specific to the subject of crimes against humanity and to the provisions of the draft articles. She supported the proposal made by other speakers that the draft preamble should contain a reference to the Rome Statute, or at least to its article 7, which concerned crimes against humanity.

The question of whether the future convention on crimes against humanity should have a monitoring mechanism was one that perhaps required further analysis. Her sense was that, in the arena of international human rights and international humanitarian law, there was currently a general "monitoring mechanism fatigue", which suggested that a cautious approach should be taken to the question if the positive momentum for a convention was to be maintained. In her opinion, the matter should be a policy decision for States to take, perhaps at a later stage, in the light of broader considerations, such as the possible development of a monitoring mechanism in tandem with a monitoring mechanism for the Genocide Convention.

Although she could understand the Special Rapporteur's position that the draft articles should not include a provision on immunities, she agreed with several other Commission members that draft articles on a convention on crimes against humanity could not be silent on the issue of the irrelevance of official capacity in determining individual criminal responsibility for crimes against humanity. Possible inspiration for a clause could be taken from article 27 (1) of the Rome Statute, which provided that the Statute "shall apply equally to all persons without any distinction based on official capacity." The principle expressed in article 27, which had its origin in the Charter of the Nürnberg Tribunal and the Charter of the International Military Tribunal for the Far East, was a cornerstone of the crimes against humanity regime and should be included in the future convention.

The issue of whether or not to permit reservations to the future convention should be left for States to decide, for the reasons already mentioned in relation to a dispute settlement mechanism. She therefore concurred with the Special Rapporteur's views on the matter and found the list of options presented in paragraphs 321 to 326 of his report to be useful. However, precisely because such a list had been provided, the Commission should provide guidance as to which reservations might or might not be envisaged. In her view, it was a matter of principle that no reservations should be permitted to the future convention or, at least, to certain specific and fundamental provisions of the current draft articles, such as those relating to the general obligation to prevent and punish, the definition of crimes against humanity, the obligation of *non-refoulement*, criminalization under national law, the establishment of national jurisdiction and the obligation to prosecute or extradite.

In conclusion, she was in favour of referring the draft articles to the Drafting Committee, and she supported the Special Rapporteur's goal of achieving a first reading of the draft articles at the current session. Nevertheless, given the comprehensive nature of the proposals in the third report and the richness of the debate thus far, she would support more time being allowed for the completion of the first reading, if necessary, since the Commission's common goal should be to strive to draft the best possible legal instrument on such an important topic.

**Mr. Peter** said that, while the preamble to a text was not legally enforceable, it was important inasmuch as it conveyed the spirit of the instrument and thus provided guidance to those involved in its application. However, the draft preamble proposed by the Special Rapporteur was, to a large extent, extraneous to the future convention on crimes against humanity, as had been noted by some members. It should therefore be reformulated — for example, through the addition of a reference to the principle of universal jurisdiction — to better reflect the primary aim of the convention itself, namely to combat impunity for crimes against humanity.

Although the Special Rapporteur had analysed the principle of universal jurisdiction in his second report (A/CN.4/690), that analysis had not resulted in a specific proposal, despite spirited efforts to urge him to proceed in that direction. The principle had been

invoked on several occasions in connection with the issuance of warrants against political leaders, particularly those in African countries. Furthermore, while in his third report the Special Rapporteur urged States to enact laws on crimes against humanity, Africa had in 2012 already adopted the African Union Model National Law on Universal Jurisdiction over International Crimes. The Commission should take account of such developments instead of seeking to reinvent the wheel. Noting that there was only one reference to universal jurisdiction in the third report, he urged the Special Rapporteur to adopt an open-minded approach in that regard and recalled that, in the discussion in the Sixth Committee, Hungary had requested that additional analysis should be given to the concept of universal jurisdiction.

In his third report, the Special Rapporteur took — perhaps unintentionally — positions on immunity, amnesty and reservations whose effect was to undermine the Rome Statute rather than to complement or improve upon it, as he had promised he would do when introducing the topic before the Working Group on the Long-term Programme of Work during the Commission's sixty-fourth session.

With regard to immunity, the Special Rapporteur indicated in paragraph 284 of his report that, consistent with the approach taken in prior treaties addressing crimes, he was of the view that the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law. The Special Rapporteur also indicated that that approach should not be construed as having any implications for the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. The Rome Statute, on the other hand, was very clear on the issue of immunity for persons alleged to have committed core crimes: article 27 (1) provided that the Statute applied equally to all persons without any distinction based on official capacity. By remaining silent on immunity, the future convention would abandon the standard set by the Rome Statute for one of the offences covered in the Statute. As a consequence, persons charged with genocide, war crimes or aggression would be treated differently from those charged with crimes against humanity under the convention that specifically dealt with that offence. If such a trend continued, the Rome Statute would soon become an empty shell, and instead of improving upon its contents, the Commission would be pruning it slowly, albeit in good faith. Like the Rome Statute, the future convention should be very clear on the question of immunity. The Commission's work on the topic of the immunity of State officials from foreign criminal jurisdiction was not directly relevant to that of crimes against humanity because it addressed crimes in general, not necessarily core crimes such as crimes against humanity.

With regard to amnesty, the Special Rapporteur set out his view in paragraph 297 of his report that, consistent with the approach taken in prior treaties addressing crimes, the draft articles should not address the issue of amnesties under national law. However, some Commission members had requested that a study should be conducted by the secretariat on that issue. Such a study might shed more light on the subject, going beyond the *Belfast Guidelines on Amnesty and Accountability* on which the Special Rapporteur had based his position. He himself would refrain from making any further comments on the subject until that study had been completed.

The Special Rapporteur's uncertainty as to what position to adopt regarding the question of reservations was unhelpful. In his own view, the subject of reservations was an area in which the Special Rapporteur should, relying on the Rome Statute for guidance, make a concrete proposal for consideration by the Commission.

He supported the Special Rapporteur's proposal to adopt the draft articles on first reading during the current session and on second reading during the seventy-first session. According to that schedule, the Commission's consideration of the topic would take a total of seven years to complete. While that might be short by the Commission's standards, he believed that the Commission's work took too long, sometimes unnecessarily so. Furthermore, it was frustrating when good topics were sometimes abandoned immediately after the designated special rapporteur's term of office on the Commission came to an end. The Commission must look critically at those problems and should step up the pace of its work if it wished to remain relevant in the field of international law.

Lastly, he wished to raise an issue concerning guidelines on the length of the reports prepared by special rapporteurs, which, in fact, differed widely. For example, the most recent report on the topic of the protection of the atmosphere had been restricted to a length that was three times shorter than that of the report under consideration and a little more than half that of the fifth report on immunity of State officials from foreign criminal jurisdiction. Even allowing for variations in the nature of those topics, that difference in length was too wide and gave the impression that a double standard was at work. Noting that the matter had more to do with equality of treatment than with length *per se*, he was of the view that it had become urgent for the Commission to set rules and provide clear guidance on the length of reports.

In conclusion, he recommended referring all the draft articles to the Drafting Committee. The Special Rapporteur should make bold decisions on the questions that remained pending, while remaining as faithful as possible to the Rome Statute, departing from it only when there were compelling reasons for doing so.

**The Chairman** said that the Bureau would consider the concerns that had been expressed.

**Mr. Hassouna** said that the concerns raised by Mr. Peter regarding the length of reports were fully understood. He recalled that the secretariat had indicated that it would look into the matter in order to find a solution for future reports. Perhaps the issue of the length of reports and other matters raised in that connection could also be taken up by the Working Group on Methods of Work.

**Mr. Huang** said that he would begin by sharing his basic views on the topic. First, although it was clear that it was the common wish of the international community to punish more severely crimes against humanity and other serious international crimes through international cooperation and that it was in the interests of the whole of humankind to do so, the topic under consideration raised complex and sensitive political issues. It was therefore of vital importance that the Commission engaged in further study of the matter and sought more substantiation of relevant international practice with a view to its codification. As members of the Sixth Committee had not yet reached broad agreement on the feasibility of drafting a separate international convention on crimes against humanity, whether or not that should be the Commission's goal should not be decided until after the second reading of the draft articles. In fact, general national practice and existing international conventions already covered the punishment of crimes against humanity in an adequate manner: those crimes now fell under the jurisdiction of the International Criminal Court; countries were obliged under existing international law to take measures to exercise criminal jurisdiction over the suspected perpetrators of such crimes; and specific crimes categorized as crimes against humanity, such as genocide, torture and enforced disappearance, were already covered by separate international conventions. What really mattered was the political will of the States concerned and of the international community as a whole to punish offenders. Moreover, it was a fact that, since 1986, only three Commission texts had been turned into international conventions, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the United Nations Convention on Jurisdictional Immunities of States and Their Property, had not yet entered into force. It was therefore doubtful whether States really had much of a will to conclude a separate convention on crimes against humanity.

Secondly, the Commission's deliberations on the topic should be based on general national practices which constituted international customary law. In other words, rather than seeking to blaze a trail and draft new laws, its aim should be codification and for that it was necessary to examine the national practice of all countries and to make allowances for differences in national legal systems. The Special Rapporteur's three reports and the draft articles and commentaries provisionally adopted by the Commission were primarily concerned with the practice of a few, newly established international criminal tribunals and made little reference to general national practice and *opinio juris*. That situation might well result in an imbalance between the codification of customary international law and the progressive development of international law.

On the one hand, there was insufficient relevant general national practice to form a basis of customary international law. While countries agreed in principle on the need to punish crimes against humanity, some acts defined as such in the draft articles were absent from or otherwise designated in national criminal codes. The Commission would be led astray in its deliberation on that topic if it focused on the progressive development of international law in that area owing to a dearth of evidence of pertinent customary international law.

On the other hand, the current practice of international criminal tribunals was too limited and inconsistent to be broadly accepted by the international community. Furthermore, the lack of agreement on the definition and constituent elements of the crimes covered by the Rome Statute had led some States not to accede to it. Against that backdrop, the Special Rapporteur had adopted methodology largely resting on induction and borrowing from the provisions of international conventions to combat torture, corruption, hostage-taking, unlawful seizure of aircraft and terrorism and he had produced a set of obligations which were deeply controversial since they fell outside the scope of existing international law. If they were presented as the fruit of the Commission's work on the topic, to be embodied in a convention, that work might simply be left on the shelf to gather dust.

Thirdly, for the sake of coherence, it would be unwise for the draft articles on crimes against humanity to touch on the application of rules on immunity of State officials from foreign criminal jurisdiction when the Commission was debating the very same matter as a separate topic. He disagreed with members who had suggested the inclusion in the draft articles of a text similar to article 27 of the Rome Statute, which ruled out any exemption of State officials from criminal responsibility, because, although the international community regarded crimes against humanity as serious international crimes, there were no customary rules of international law which excluded the possibility of granting State officials immunity from foreign criminal jurisdiction. In any case, such immunity was essentially procedural and did not exempt the individuals concerned from substantive responsibility. The Commission should therefore adopt a prudent approach to the question of immunity. For the same reason, he was against introducing the concept of universal jurisdiction in the draft articles. As discussions in the Sixth Committee over the previous nine years had shown, there was no consensus among States concerning the definition or scope of application of that concept.

When discussing the prevention and punishment of crimes against humanity, the Commission should not ignore the root causes of those crimes. Reality showed that most incidents involving widespread or systematic attacks against the civilian population occurred during complex, political, economic, racial or religious disputes or conflicts, some of which were the horrific consequences of outside interference aimed at forcibly changing the legitimate Government of another country. The tragedies of "failed States" were a case in point. Legal sanctions alone were not enough to punish crimes against humanity. Instead, what was needed was a multi-pronged approach where political solutions were regarded as equally important as legal solutions, if not more so. Preventing and punishing crimes against humanity required the combined use of all possible legal, political, economic and cultural means. The Commission and the Special Rapporteur should therefore abandon purely legalistic thinking and not rule out political solutions such as immunity, reconciliation, special pardon or general amnesty as means to obtain justice, reduce tension or restore social and public order.

It was also essential to remember the principles embodied in the Charter of the United Nations, especially those of sovereign equality, the prohibition of the illegal use of force, non-interference in the internal affairs of other countries and the peaceful settlement of international disputes. Those basic norms were of paramount importance for preventing and punishing crimes against humanity and must be complied with in good faith. In that connection, he recalled that the proceedings instituted against Mr. Uhuru Kenyatta by the International Criminal Court had given rise to controversy in Kenya and the African Union over whether the Court was trying to impose its values and interfere in the internal affairs of Kenya. The Commission should draw a lesson from that and similar cases. Any international cooperation to prevent and punish crimes against humanity must rest on the independence, equality and mutual respect of States and the consent of the countries

involved, and must seek to safeguard international and regional peace and to reduce tension. Since it was essential to reject double standards and power politics in State-to-State relations and to oppose any illegal use of force or any attempt to overthrow the legitimate Government of another country ostensibly in order to punish crimes against humanity, the corresponding wording must be incorporated in the preamble of the draft articles.

Turning to the Special Rapporteur's third report, he said that he agreed with the comments of a number of other members about its length. In his view, the length of the report was only the surface of the problem and in fact reflected three main substantive issues. First, the Special Rapporteur had taken the progressive development of international law too far, because he proposed a complete set of draft articles that went beyond the codification of customary international law in that they transcended its scope and applied to crimes against humanity rules that were applicable to different crimes. As a result, there was an imbalance between *lex lata* and *lex ferenda*. Secondly, the Special Rapporteur had tried too hard to introduce a complete, stand-alone legal system for punishing crimes against humanity which would then overlap with existing international law regimes and rules. The draft articles could be described as dealing with everything and anything, including subjects where there was no need for detailed new texts because well-established treaty mechanisms or domestic law rules already existed. Moreover, since crimes against humanity were different in nature from the crime of corruption or transnational organized crimes, it was difficult to apply the same rules by analogy. Thirdly, the draft articles were unduly idealistic and full of noble elements that bore little relation to the complex and cruel reality of international relations. For example, jurists advocated the punishment of offenders regardless of their official positions, yet none of the leaders of powerful countries had ever been prosecuted by the International Criminal Court. When working on the draft articles and while encouraging member States to accept the idea of the rule of law, the Commission should also have regard to States' ability to accept the relevant rules and it should leave sovereign States the necessary space and discretion. When an issue involved State sovereignty, it was essential to uphold the principles of sovereign equality and voluntary consent. When considering the provisions of draft article 17 on compulsory dispute settlement, it should be asked how many permanent members of the Security Council had accepted the compulsory jurisdiction of the International Court of Justice and how many of those countries had acceded to the Rome Statute. However nicely a rule was crafted, it would remain mere words on paper without the extensive support of Member States.

On the issue of extradition, he shared the views expressed by many members that it was necessary to ponder whether article 44 of the United Nations Convention against Corruption formed an appropriate basis for draft article 11. The statements in paragraph 21 of the report that "extradition of such offenders may occur pursuant to the rights, obligations and procedures set forth in multilateral or bilateral extradition agreements addressing crimes more generally, where they exist between a requesting State and requested State, or pursuant to national laws or policies when those are regarded as sufficient by the requested State" and in paragraph 26 that "a variety of factors in any given situation may suggest that one or the other requesting State is best situated to prosecute, and it is always the case that the State where the alleged offender is present may elect to submit the case to its own competent authorities for the purpose of prosecution instead of extraditing" argued against the incorporation of provisions on extradition into the draft articles. The report merely showed that there were two approaches to extradition, one "more detailed", the other "less detailed", and suggested that the rationale for adopting the more detailed approach was the accession of 181 States to the above-mentioned Convention. Although the Special Rapporteur acknowledged in paragraph 83 that a "crime against humanity by its nature is quite different from a crime of corruption", he provided insufficient evidence that the rules proposed in that Convention were appropriate. The reasoning given in paragraph 152 for the wording of draft article 13 on mutual legal assistance, namely that the issues arising in the context of mutual legal assistance were largely the same regardless of the nature of the crime, was also unconvincing, since States were not necessarily willing to transpose rules from one convention to another.

While the status of the principle of *non-refoulement* was undeniably established in customary international law, the report did not demonstrate that the norms of such instruments as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance should apply in the event of crimes against humanity, since the latter crimes were plainly more varied in their forms than those of torture or enforced disappearance. Hence there was insufficient evidence that the provisions of the conventions on those crimes could be transferred directly to draft article 12.

The reasoning supporting the formulation of draft article 13 was similar to that underpinning draft article 11. Yet again there was a lack of evidence and practice showing that the rules of the United Nations Convention against Corruption applied equally to crimes against humanity. Nor was any proof given that "more detailed" legal assistance provisions took precedence over "less detailed" ones. Three United Nations conventions contained "less detailed" provisions and focused on promoting international cooperation. However, it was unclear whether draft article 13 sought to guide cooperation among States parties or to provide a basis for cooperation among States that had not concluded legal assistance treaties, thereby turning the article into a "mini mutual legal assistance treaty". He wondered how many States were in that situation and whether they would be willing to apply the provisions set forth in paragraphs 10 to 28 of the draft article in question. If States were unwilling to apply them, or had already concluded legal assistance treaties, the draft article would be less useful.

As far as draft article 14 was concerned, the fact that issues relating to victims, witnesses and other affected persons invariably arose after a crime against humanity had been committed did not logically imply that provisions on those persons' rights should be included in a treaty on that kind of crime because, as could be seen from paragraphs 163 to 168 of the report, different treaties adopted a variety of approaches to their rights, and States parties often defined the term "victim" in accordance with their domestic law. Hence their rights would be better protected through provisions on litigation procedures of States or international criminal judicial organs. While he agreed with the view of some members that the intention behind paragraph 3 on reparation was good, he wondered whether it was operable and what restitution or a guarantee of non-repetition really meant in practice in the context of crimes against humanity.

Since paragraph 198 of the report stated that the draft articles had been written in order to avoid any conflict with States' rights or obligations in relation to international criminal tribunals, the need for draft article 15 was questionable. Indeed, its inclusion might complicate relations between parties and non-parties to the Rome Statute or to agreements governing other international criminal tribunals in the future. That issue should therefore be decided by States at diplomatic conferences. He agreed with the view on immunity expressed by the Special Rapporteur in paragraph 284 of the report. However, the inclusion of draft article 15 would inevitably raise questions about the relationship between articles 27 and 98 of the Rome Statute, a matter which had not been clarified by the Assembly of States Parties to the Statute.

Draft article 16 on federal State obligations seemed to lack substantive meaning and some treaties explicitly ruled out any adjustments to accommodate a federal structure. If the Commission were determined to include the content of that draft article, it might be better to leave the matter until the second reading.

He supported the view that the selection of a particular monitoring mechanism should be left to the decision of States. He disagreed with those members who thought that draft article 17 (3), permitting withdrawal from inter-State dispute settlement, would weaken the role of international criminal judicial organs. Even in the absence of the provisions set out in draft article 17, States could peacefully resolve disputes concerning the interpretation or application of the potential convention according to existing rules.

As crimes against humanity were different from the other three crimes covered by the Rome Statute, rather than echoing the preamble to the latter, the preamble should be worded in a way as to be more relevant to the prevention and suppression of such crimes.

He was in favour of submitting all the draft articles contained in the third report to the Drafting Committee.

*The meeting rose at 11.45 to enable the Drafting Committee on Provisional application of treaties to meet.*